

No. 143, Original

In the Supreme Court of the United States

STATE OF MISSISSIPPI,
Plaintiff,

v.

STATE OF TENNESSEE; CITY OF MEMPHIS, TENNESSEE;
AND MEMPHIS LIGHT, GAS & WATER DIVISION,
Defendants.

ON BILL OF COMPLAINT

**MEMORANDUM OF DECISION ON TENNESSEE'S MOTION TO DISMISS,
MEMPHIS AND MEMPHIS LIGHT, GAS & WATER DIVISION'S MOTION TO
DISMISS, AND MISSISSIPPI'S MOTION TO EXCLUDE**

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August 12, 2016

I. INTRODUCTION

This memorandum of decision addresses the motions for judgment on the pleadings filed by Tennessee; the City of Memphis, Tennessee (“Memphis”); and Memphis Light, Gas & Water Division (“MLGW”), as well as Mississippi’s motion to exclude materials outside the complaint from consideration. As discussed in more detail below, the complaint appears to fail to plausibly allege that the Sparta Sand aquifer (“Aquifer”) or the water in it is not an interstate resource. Because, under federal common law, equitable apportionment is necessary to grant relief in a dispute over interstate water in the absence of an interstate compact—and Mississippi has made it explicit that it does not seek an equitable apportionment of the Aquifer—dismissal would likely be warranted under Rule 12.

But the Federal Rules of Civil Procedure are only guides in cases within the Supreme Court’s original jurisdiction, and not mandatory. The Court has tasked Special Masters with the responsibility of preparing an adequate record for review, and it has counseled them to err on the side of over-inclusiveness. On the other hand, the Court requests that Special Masters move the case along in timely and efficient manner. With the aim of balancing these interests, the undersigned concludes that holding an evidentiary hearing on the limited—and potentially dispositive—issue of whether the Aquifer is, indeed, an interstate resource is appropriate.

II. FACTUAL AND PROCEDURAL BACKGROUND

This is a dispute over groundwater near the border of Mississippi and Tennessee. (*See* Compl. ¶ 14.) According to the complaint, the “groundwater at issue was naturally collected and stored in a distinct deep sandstone geological formation . . . sandwiched between upper and lower clay formations [that] are impermeable, or of very low permeability.” (*Id.* at ¶ 15.) The Aquifer “begins at a surface outcrop within [north] Mississippi[] and descends with an east-to-

west/southwest slope while thickening as it moves toward the Mississippi River.” (*Id.*) “Originally, . . . rainwater falling within Mississippi’s current borders collected on the formation outcrops[,] was drawn by gravity into and down the natural east-to-west/southwest dip of the formation at a rate of about an inch a day[,] and was stored as groundwater within the territorial borders of Mississippi.” (*Id.* at ¶ 16.) As a result, Mississippi alleges, the Aquifer under became “saturated with high[-]quality groundwater stored as a fairly constant volume residing under significant hydrostatic pressure within Mississippi’s borders.” (*Id.* at ¶ 17.) Under Mississippi’s account, this groundwater “is a finite, confined intrastate natural resource” that “would never be available within Tennessee’s territorial borders” under natural conditions. (*Id.*) Nevertheless, Mississippi admits that “the Sparta Sand formation . . . extends into western Tennessee” and that “the Memphis Sand Aquifer was supplied in large part by the Sparta Sand.” (*Id.* at ¶¶ 18, 22.)

Among other things, MLGW provides water utility services to residents of Memphis, Tennessee. (*See id.* at ¶ 18.) For many years, MLGW has pumped groundwater from the Aquifer. (*Id.*) “Between 1965 and 1985, . . . MLGW significantly expanded its groundwater pumping operations from five to nine well fields” (*Id.* at ¶ 19.) In addition, it increased its pumping during that time from 72 million gallons a day (“MGD”) to more than 131 MGD. (*Id.*) At the Lichterman well field, which is located within three miles of Mississippi’s border, MLGW increased its pumping from approximately 4 MGD to over 21 MGD. (*Id.*) During this time, “MLGW also developed two additional well fields within three miles of the Mississippi border, Davis and Palmer, which were collectively pumping approximately 11.5 MGD.” (*Id.*) Mississippi alleges that MLGW’s pumping is “permanently taking between 20 and 27 MGD of Mississippi’s natural groundwater storage out of the Sparta Sand.” (*Id.* at ¶ 22.)

In 2005, Mississippi filed suit against Memphis and MLGW (collectively, the “Memphis Defendants”) in the United States District Court for the Northern District of Mississippi, pleading conversion, trespass, unjust enrichment, constructive trust, and nuisance claims related to MLGW’s pumping. Amended Complaint at 9–15, *Hood ex rel. Mississippi v. City of Memphis, Tenn.*, No. 2:05-cv-00032-GHD (N.D. Miss. Oct. 5, 2006) (ECF No. 112); Complaint at 1, *Hood ex rel. Mississippi v. City of Memphis, Tenn.*, No. 2:05-cv-00032-GHD (N.D. Miss. Oct. 5, 2006) (ECF No. 2). In 2008, the district court dismissed the case for failure to join a necessary party, Tennessee, under Rule 19 of the Federal Rules of Civil Procedure. *Hood ex rel. Mississippi v. City of Memphis, Tenn.*, 533 F. Supp. 2d 646, 650 (N.D. Miss. 2008). The district court reasoned that “the doctrine of equitable apportionment has historically been the means by which disputes over interstate waters are resolved,” that the Aquifer had never been apportioned, and that, without an apportionment, it could not “afford relief to the Plaintiff and hold that the Defendants are pumping water that belongs to the State of Mississippi, because it has not yet been determined which portion of the aquifer’s water is the property of which State.” *Id.* at 648. According to the court, awarding relief would necessitate “engaging in a *de facto* apportionment of the subject aquifer,” but such relief “is in the original and exclusive jurisdiction of the United States Supreme Court because such a dispute is necessarily between the State of Mississippi and the State of Tennessee.” *Id.*

On appeal, the Fifth Circuit affirmed. *Hood ex rel. Mississippi v. City of Memphis, Tenn.*, 570 F.3d 625, 627 (5th Cir. 2009). The panel found that “the district court made no error of law as to the necessity of equitably apportioning the Aquifer” because it “is an interstate water source, and the amount of water to which each state is entitled from a disputed interstate water source must be allocated before one state may sue an entity for invading its share.” *Id.* at 629–30

(citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104–05 (1938)). The court found that the suit implicated Tennessee’s interest in the Aquifer and that, because equitable apportionment was required, the district court did not err in “conclu[ding] that Tennessee’s presence in the lawsuit was necessary to accord complete relief to Mississippi and Memphis.” *Id.* at 631. Tennessee was a required party, the court determined, and its joinder would “depriv[e] the district court of subject-matter jurisdiction because a suit between Mississippi and Tennessee for equitable apportionment of the Aquifer implicates the exclusive jurisdiction of the Supreme Court under 28 U.S.C. § 1251(a).” *Id.* at 632. Therefore, dismissal was appropriate. *Id.* at 632–33.

In reaching this conclusion, the Fifth Circuit rejected Mississippi’s argument that “it owns a fixed portion of the Aquifer because it controls the resources within its state boundaries.” *Id.* at 630. The panel reasoned that “[t]he Supreme Court has consistently rejected the argument advanced by different states, and advanced by Mississippi in this lawsuit, that state boundaries determine the amount of water to which each state is entitled from an interstate water source.” *Id.* (citing *Hinderlider*, 304 U.S. at 102).

Mississippi filed a petition for certiorari, which the Court denied. *Mississippi v. City of Memphis, Tenn.*, 130 S. Ct. 1319 (2010). Contemporaneously, Mississippi also moved the Court for leave to file a bill of complaint. The Court denied this motion without prejudice.

On June 6, 2014, Mississippi filed a motion for leave to file a bill of complaint in the instant matter. Tennessee and the Memphis Defendants opposed the motion, as did the United States, acting as amicus curiae at the Court’s invitation. The Court granted Mississippi leave to file its complaint, and Tennessee and the Memphis Defendants subsequently filed answers.

In its complaint, Mississippi claims that, “[t]hrough its water well development and mechanical pumping operations,” MLGW has, without permission, “forcibly siphoned into Tennessee hundreds of billions of gallons of high quality groundwater owned by Mississippi and held in trust by Mississippi for its people.” (Compl. ¶ 23.) According to Mississippi, this groundwater “would have never under normal, natural circumstances been drawn into Tennessee or available to Tennessee,” and MGLW’s “pumping is intended to and does pull Mississippi’s groundwater out of natural storage in a northward direction, altering the water’s natural east-to-west path.” (*Id.* at ¶ 24.) Mississippi maintains that this pumping, which utilized “modern . . . technology,” removed its groundwater “at an accelerated velocity substantially in excess of the water’s natural seepage rate.” (*Id.*) The complaint alleges that this phenomenon “is evidenced by a substantial drop in pressure and corresponding drawdown of stored water in the Sparta Sand in Mississippi in a pattern covering substantially all of DeSoto County in northwest Mississippi across the state border from Memphis.” (*Id.* at ¶ 25.) Moreover, Mississippi claims that MLGW’s pumping has created a hydrologic feature known as a “cone of depression” that extends into north Mississippi. (*Id.* at ¶¶ 25, 30.) As a result, Mississippi contends, “groundwater is being drawn down more rapidly than the Sparta Sand in north Mississippi can be recharged or replenished,” and “water wells located in the Sparta Sand formation in Mississippi must now be drilled and pumps lowered to substantially greater depths,” thereby imposing greater costs on the citizens of Mississippi who rely on the Aquifer for their groundwater. (*Id.* at ¶ 54(b).)

As for Memphis and Tennessee, Mississippi contends that they oversaw MLGW’s pumping. (*Id.* at ¶ 19.) Specifically, the complaint avers that, “[a]t all relevant times, Tennessee has supervised, authorized[,], and regulated the construction, operation, and maintenance of Memphis-MLGW’s public water system, including all features relating to quantity and source of

water supply.” (*Id.* at ¶ 21.) Mississippi claims that this control “extends to the location and drilling of water wells and the withdrawal of groundwater from MLGW wells.” (*Id.*)

Seeking relief under Article IV, Section 3, Clause 1 of the United States Constitution, the complaint requests a “declaratory judgment establishing Mississippi’s sovereign right, title[,] and exclusive interest in the groundwater stored naturally in the Sparta Sand formation underlying Mississippi which would not, absent Defendant[s’] pumping, be available to Defendants.” (*Id.* at ¶ 40.) This declaration would be to the effect that

as between Mississippi and Tennessee, (a) since its admission into the United States, Mississippi has owned and continues to own all right, title[,] and interest in groundwater stored naturally in the Sparta Sand formation underneath Mississippi’s borders which does not cross into Tennessee under natural predevelopment conditions; and (b) since its admission as a State into the United States, Tennessee has owned and continues to own all right, title[,] and interest in groundwater located naturally in the Sparta Sand formation underneath Tennessee’s borders which does not cross into Mississippi under natural conditions.

(*Id.* at ¶ 46.) In addition to declaratory relief, Mississippi seeks damages for the value of the groundwater taken from within its borders, estimated at “not less than \$615 million.” (*Id.* at ¶ 55.) Alternatively, the complaint claims that the “Defendants have obtained benefits by acts of trespass or conversion or comparable tortious interference with Mississippi’s protected interests in tangible property” and requests “restitution for the value of all groundwater wrongfully taken from Mississippi.” (*Id.* at ¶ 56.)

Mississippi does not, however, plead a claim for equitable apportionment in the alternative. Rather, the complaint repeatedly and specifically maintains that equitable apportionment does not apply in this action. (*See id.* at ¶¶ 38, 48–50.) Mississippi draws a distinction between the Aquifer’s “geological formation on the one hand,” which it admits underlies both Mississippi and Tennessee, and, “on the other hand, the source, location[,] and

hydrologic characteristics of the groundwater stored in the formation under natural conditions.” (*Id.* at ¶ 50.) According to the complaint, the water Mississippi brings suit over “is *neither* interstate water *nor* a naturally shared resource” because the “Defendants must mechanically pump the water from underneath Mississippi’s borders in order to produce and use it.” (*Id.*) As such, Mississippi claims that Tennessee has no right to the water and, therefore, equitable apportionment does not apply. (*Id.*)

On November 10, 2015, the Court appointed the undersigned as Special Master, and an initial conference was held on January 26, 2016. Following the initial conference, the parties filed an agreed case management order permitting the defendants to file motions for judgments on the pleadings.

III. MOTIONS BEFORE THE SPECIAL MASTER

There are three motions currently pending. Tennessee and the Memphis Defendants have each filed a motion for judgment on the pleadings, and the United States, acting as amicus curiae, has filed a brief in support of these motions. Mississippi has responded and filed a motion to exclude certain materials the defendants and the United States have relied on.

In its motion for judgment on the pleadings, Tennessee raises two separate arguments. First, Tennessee contends that “Mississippi’s claims fail as a matter of law because Mississippi has no enforceable property right to the unapportioned groundwater in the Aquifer.” (Tenn. Mot. 14.) According to Tennessee, the theory that undergirds Mississippi’s claim—that Memphis’s groundwater pumping deprived Mississippi of water within its borders that it owned upon becoming a state—is inconsistent with the Supreme Court’s equitable-apportionment jurisprudence. Under prevailing doctrine, states cannot claim exclusive control over interstate waters that flow within their borders. Rather, states must enter interstate water compacts or seek

an equitable apportionment of the water. Although Mississippi generally claims that the Aquifer is *not* an interstate resource, Tennessee argues that the factual allegations contained in the complaint, Mississippi’s briefing, and Mississippi’s admissions in prior litigation show that the Aquifer is, in fact, an interstate body of water.

Second, Tennessee maintains that “Mississippi’s claims are barred by issue preclusion.” (Tenn. Mot. 35.) Tennessee contends that, in *Hood*, Mississippi had a “full and fair opportunity to litigate” its theory that it has an “enforceable property right to a portion of the Aquifer’s groundwater” in the absence of an equitable apportionment. (*Id.* at 36.) Indeed, Mississippi raised substantially similar arguments, and the Fifth Circuit rejected them. Therefore, according to Tennessee, issue preclusion bars Mississippi from raising these issues now.

The Memphis Defendants’ motion raises points similar to Tennessee’s. The Memphis Defendants aver that Mississippi’s claim that the Aquifer is not an interstate body of water is a “conclusory allegation”—“an unsupported legal conclusion”—that the Court need not accept as true. (Memphis Mot. 17–18.) According to the Memphis Defendants, “[t]he case law is clear: water in an interstate resource is interstate water,” and interstate water is subject to equitable apportionment. (*Id.* at 17.) The Memphis Defendants contend that the Court need not credit Mississippi’s claim that the Aquifer is not interstate water because it is a mere legal conclusion and is contradicted by the facts contained in the complaint. Moreover, the Memphis Defendants point out, Mississippi repeatedly identified the Aquifer as an interstate resource in prior litigation. Because the Aquifer has not yet been equitably apportioned—and because Mississippi does not seek equitable apportionment—the Memphis Defendants aver that Mississippi has failed to state a valid claim for misappropriation.

Additionally, the Memphis Defendants, like Tennessee, contend that the doctrine of issue preclusion bars Mississippi's claims. According to this reasoning, the Fifth Circuit previously found that "the Aquifer is an 'interstate water source' and that 'the amount of water to which each state is entitled . . . must be allocated before one state may sue an entity for invading its share.'" (*Id.* at 26 (quoting *Hood*, 570 F.3d at 630).) Upon dismissal of the case, Mississippi could not relitigate the issues already decided by the Fifth Circuit.

The Memphis Defendants reiterated their position that (1) equitable apportionment provides "the sole judicial mechanism for resolving this interstate water dispute," and (2) "unless and until the Aquifer is apportioned, Mississippi has no right to claim a portion of the interstate water." (*Id.* at 28.) Further, they claim that "Mississippi has not asserted a real or substantial injury" sufficient to support an original action because "Mississippi's complaint does not contain any concrete allegations of an adverse impact to Mississippi's present or future use of the groundwater in dispute." (*Id.* at 30–31.)

In addition, the Memphis Defendants contend that Mississippi's conversion and trespass claims fail as a matter of law. The Memphis Defendants assert that, under Supreme Court precedent, "states do not 'own' the groundwater beneath them"—at least not when that groundwater is part of an interstate resource. (*Id.* at 32.) They claim that Mississippi state law does not provide that the state owns interstate groundwater that resides within its territorial boundaries. Moreover, the Memphis Defendants contend that, as a general principle, groundwater must be reduced to possession—i.e., pumped and taken control of—before a party can assert ownership of it. Mississippi admits that Memphis's pumps did not enter the state; therefore, it cannot assert a conversion claim for water that Memphis pumped within Tennessee that Mississippi never gained control over. As for trespass, the Memphis Defendants assert that

this claim fails under Mississippi law because the Mississippi Supreme Court has rejected claims that a trespass occurs when a defendant's never made any entry onto the plaintiff's land. Finally, the Memphis Defendants argue that neither the equal-footing doctrine nor the public-trust doctrine supports Mississippi's claim that it owns the groundwater at issue; the cases Mississippi cited do not involve a dispute over an *interstate* resource.

Acting as amicus curiae, the United States filed a brief in support of Tennessee and the Memphis Defendants. To provide context for its position, the United States asserts its "substantial interest in the proper legal standards governing uses of interstate resources." (U.S. Br. 1.) According to the United States, Mississippi has "not state[d] a cognizable cause of action because the Aquifer is an interstate water resource that has not yet been equitably apportioned among the relevant States." (*Id.* at 12.) The United States asserts that the facts alleged in Mississippi's complaint demonstrate that the Aquifer is an interstate resource: Mississippi admits that the Aquifer lay beneath both Mississippi and Tennessee, and MLGW's pumping in Tennessee influences the movement of groundwater in Mississippi. In addition, the expert report attached to the complaint demonstrates that, even before groundwater was pumped from the Aquifer in Memphis, water flowed between Mississippi and Tennessee.

The United States also contends that the equal-footing doctrine does not support Mississippi's position. While the doctrine provides that states have title to lands within their boundaries, no Supreme Court decision has held "that any one State has title, to the exclusion of any entitlement of another State, to subsurface groundwater that is flowing through an aquifer spanning several States." (*Id.*) Rather, according to the United States, "equitable apportionment is required to reconcile competing rights whenever 'the action of one state reaches, through the agency of natural laws, into the territory of another State.'" (*Id.* at 12–13 (quoting *Kansas v.*

Colorado, 206 U.S. 46, 97–98 (1907)).) Consequently, “[t]he applicability of equitable apportionment does not turn on whether groundwater in the Aquifer would remain in Mississippi but for [the] defendants’ pumping.” (*Id.* at 13.)

In addition, the United States questions the validity of Mississippi’s distinction between the Aquifer’s “geologic formation” and the water the Aquifer contains. If this distinction were valid, according to the United States, the logical conclusion would be that Tennessee could not pump any water from the Aquifer, because doing so would cause water to flow out of Mississippi. At bottom, the United States takes the position that Mississippi’s theory of sovereign ownership of water in the Aquifer “would contravene basic principles of water law.” (*Id.*)

As for issue preclusion due to the Fifth Circuit’s prior ruling, the United States contends that the Court need not address the matter “[b]ecause the Aquifer is an interstate water source and Mississippi has disclaimed the only claim and remedy that could be available to it.” (*Id.* at 23 n.4.) Although the Court has previously assumed that issue preclusion could apply in an original action, the United States notes that

there is some force to Mississippi’s previous observation that the application of issue preclusion (based on the decisions of the district court and court of appeals in *Hood*) on the question [of] whether an equitable apportionment is required before Mississippi would have a cognizable cause of action against Tennessee, could be categorized as “delegat[ing]” th[e] Court’s exclusive jurisdiction to federal district courts and courts of appeals because the very subject of an equitable apportionment *between two States* is one committed to that exclusive jurisdiction.

(*Id.* (second alteration in original).)

Mississippi opposed these motions. It claimed that, pursuant to Article IV, Section 3 of the United States Constitution, it retained “sovereign ownership, control, and dominion over the land and waters within its territorial boundaries” upon admission to the Union and “was granted

full jurisdiction over the lands within its borders, including the beds of streams and other waters”—absent an act of Congress or the imposition of an unlawful burden on interstate commerce. (Miss. Resp. 8–9 (quoting *Rhode Island v. Massachusetts*, 37 U.S. 657, 733–35, 737–40 (1838)).) Mississippi claims that, under its own law, it “hold[s], manage[s], preserve[s], and protect[s] all waters within its territorial borders.” (*Id.* at 10.) As a result, Mississippi claims, the “Defendants’ intentional taking of groundwater located within Mississippi through pumping as alleged in the Complaint” violates its “territorial sovereignty and its sovereign authority to establish and enforce its water policy within Mississippi.” (*Id.* at 14.) Mississippi asserts that, under these circumstances, the Court has “all the authority necessary to grant any relief it determines appropriate in the exercise of its original and exclusive jurisdiction,” including monetary damages. (*Id.* at 14–15.)

Mississippi argues that the Court’s equitable apportionment precedent does not support Tennessee’s, the Memphis Defendants’, and the United States’ arguments that the case should be dismissed for failure to state a cognizable claim. Mississippi contends that its complaint covers only *intrastate* water because the complaint limits its claims to “water naturally residing within Mississippi [that] would never[,] under natural conditions, reside in Tennessee.” (*Id.* at 17.) As such, Mississippi maintains that Tennessee has no “equitable interest” in the Aquifer’s water. (*Id.* at 17–18.)

Accordingly, Mississippi maintains that “the Defendants’ intentional pumping of Mississippi groundwater from within Mississippi into Tennessee constitutes, *inter alia*, trespass, conversion, and intentional tortious conduct,” as well as “a classic claim for restitution based on their violation of Mississippi’s territorial sovereignty and taking of Mississippi’s natural resources held by Mississippi in trust for its citizens, without consent or compensation.” (*Id.* at

23–24 (footnotes omitted).) In response to the Memphis Defendants’ argument that no trespass has occurred because they did not physically invade Mississippi’s property, Mississippi avers that “[t]he fact that MLGW’s wells are physically located within Tennessee’s borders does not negate Mississippi’s trespass claims, because trespass may be premised on a defendant causing something to invade the plaintiff’s premises, regardless of whether the defendant . . . has physically invaded the plaintiff’s premises.” (*Id.* at 26.) Moreover, Mississippi contends, its sovereign interest in protecting water within its borders is sufficient to sustain its claim under the public-trust doctrine “simply because the water was located within Mississippi when [the] Defendants took it.” (*Id.* at 30.) Mississippi also reiterated that, although “some groundwater in the Sparta Sand in Mississippi . . . gradually seeps into Tennessee under natural conditions,” it “has made clear that such groundwater is not part of its claims.” (*Id.* at 30 n.22.)

Mississippi contends that Tennessee’s, the Memphis Defendants’ , and the United States’ arguments that allowing its claims to proceed would undermine settled water policy across the nation are “speculative” and “unfounded.” (*Id.* at 32.) Mississippi maintains that these “arguments rely on equitable apportionment concepts and cases that have *no* application to this case.” (*Id.*). Moreover, according to Mississippi, this case concerns Mississippi’s sovereign rights, and “there is no indication that the hydrologic characteristics of water stored in the Sparta Sand in north Mississippi, as pled by Mississippi, are present in any other locations.” (*Id.*) In addition, Mississippi argues that the extent of discovery necessary to resolve the case cannot be a reason to prevent the case from moving forward if it has pleaded viable claims. (*Id.* at 34–36.)

Finally, Mississippi contends that issue preclusion does not apply. Mississippi notes that the United States has not argued in favor of issue preclusion, and it maintains that, even if prior decisions “purported to determine the parameters of Mississippi’s rights vis-à-vis Tennessee”

the courts lacked “jurisdiction to make a determination limiting Mississippi’s rights and claims” because Article III, Section 2 of the Constitution vests exclusive jurisdiction over disputes between states in the Supreme Court. (*Id.* at 36.) Although Mississippi concedes that the district court and the Fifth Circuit acted within their jurisdiction in determining that Tennessee was an essential party under Rule 19 that Mississippi failed to join in the prior litigation, it maintains that the courts’ “extraneous comments on the ultimate remedies that may or may not be available in [the Supreme] Court exceeded their jurisdiction and are a nullity.” (*Id.* at 38.) Moreover, Mississippi maintains, the only determinations “essential” to the courts’ decision were that Mississippi’s “claims of groundwater ownership implicated Tennessee’s sovereign interests” and that Tennessee “could not be joined in the suit because of the Supreme Court’s original jurisdiction over competing interests between the two states.” (*Id.* at 38–39.) Accordingly, Mississippi contends that issue preclusion does not apply to any determination that equitable apportionment is the sole available remedy in this dispute.

Contemporaneously with its response to the defendant’s motions, Mississippi filed a motion to exclude “those materials outside Mississippi’s [c]omplaint that have been presented by [the] Defendants as part of their motions for judgment on the pleadings.” (Miss. Mot. to Exclude 3.) According to Mississippi, Tennessee’s and the Memphis Defendants’ motions for judgment on the pleadings improperly relied on materials outside the complaint, including materials Mississippi filed in its Appendix to its motion to file a bill of complaint in this matter; the record from the prior litigation between Mississippi and the Memphis Defendants; statements from the January 26, 2016, hearing before the Special Master; briefs filed in support of or in opposition to Mississippi’s motion to file a bill of complaint; factual allegations in the Defendants’ answers;

and third-party groundwater studies and population estimates. (*Id.* at 4.) Mississippi contends that these materials are not proper to consider on a motion to dismiss under Rule 12.

The Memphis Defendants filed a reply in support of their motion to dismiss and responded in opposition to Mississippi's motion to exclude. The Memphis Defendants argue that Mississippi has conceded that the Aquifer is an interstate resource and that Mississippi's attempt to define the water in the Aquifer that would not have entered Tennessee in the absence of pumping as intrastate water is "fictional." (Memphis Reply 4–5.) According to the Memphis Defendants, the Supreme Court has long recognized that "an interstate water resource can be allocated between states only by interstate compact or equitable apportionment." (*Id.* at 7 (citations omitted).) The Memphis Defendants contend that the Fifth Circuit correctly found that the Aquifer was an interstate water resource subject to equitable apportionment and that applying equitable apportionment principles to interstate groundwater disputes fits within the Supreme Court's decisions on the doctrine.

Turning to Mississippi's arguments, the Memphis Defendants contend that, because "[t]he Aquifer was (and is) a water-bearing natural resource underlying what is now Mississippi and Tennessee long before the states were settled and their common boundary line established[,]" . . . Mississippi cannot viably claim that Tennessee has no established or equitable right to the groundwater at issue." (*Id.* at 12.) As for Mississippi's claim that interstate water is not at issue because it limits its claims to water that would not have entered Tennessee "under natural conditions," the Memphis Defendants aver that the Supreme Court has never adopted such a position. (*Id.*) In addition, the Memphis Defendants contend that Mississippi's own laws do not support its position in this case because its statutes treat interstate groundwater the same as above-ground interstate water resources and that "disputes between private landowners over a

shared aquifer are resolved, *not by conversion and trespass claims based on property lines*, but instead by prioritizing the nature of the use of the groundwater by the competing pumpers on their respective properties.” (*Id.* at 14–15.) The Memphis Defendants also claim that Mississippi cannot rely on its sovereign rights to bring this action because Mississippi attempts to impose its law outside its borders, violating Tennessee’s sovereign rights in the process. Additionally, the Memphis Defendants note, the equitable-apportionment doctrine has its roots in the same type of dispute as the present matter.

Finally, the Memphis Defendants reiterate their position that issue preclusion applies. In essence, the Memphis Defendants argue that the Fifth Circuit’s finding that equitable apportionment was necessary was essential to its determination that it lacked subject matter jurisdiction, and “every court has jurisdiction to determine whether it has subject matter jurisdiction.” (*Id.* at 22.)

In response to Mississippi’s motion to exclude, the Memphis Defendants argue that the Court need not accept Mississippi’s legal conclusions as true and that the Court can take judicial notice of the materials within the record in this case, materials filed in and statements made in the prior litigation between Mississippi and the Memphis Defendants, and government reports from the United States Geological Survey.

Tennessee also filed a reply in support of its motion to dismiss and responded in opposition to Mississippi’s motion to exclude. Tennessee argues that the equitable-apportionment doctrine forecloses Mississippi’s sovereign-ownership theory of recovery. From a factual perspective, Tennessee contends that the complaint “does not support the implication of physical intrusion suggested in [Mississippi’s] brief” because Mississippi admits that all of the relevant pumping took place within Tennessee’s borders. (Tenn. Reply 4–5.) Tennessee also

reiterates that, because Mississippi admits that some groundwater in the Aquifer would travel into Tennessee under natural conditions and that the Aquifer is a single formation that underlies more than one state, it is an interstate resource by definition. Tennessee also argues that Mississippi's attempt to distinguish between surface water and groundwater for the purposes of equitable apportionment is unpersuasive. For similar reasons to the Memphis Defendants', Tennessee contends that Mississippi's arguments conflict with Supreme Court precedent and Mississippi's own law and that issue preclusion applies.

In response to Mississippi's motion to exclude, Tennessee argues that Mississippi incorporated by reference the Appendix to its motion for leave to file a complaint. Moreover, Tennessee contends, like the Memphis Defendants, that the Court may consider statements made in prior litigation for their existence, if not their truth. In addition, Tennessee claims that the Court may take judicial notice of the Census population estimates Tennessee relies on in its motion for judgment on the pleadings.

The United States also filed a memorandum in opposition to Mississippi's motion to exclude. In it, the United States contends that "[a]ll of the materials Mississippi seeks to exclude are properly reviewable on a Rule 12(c) motion." (U.S. Resp. to Mot. to Exclude 2.) The United States points out that a court may take judicial notice of filings and decisions in prior litigation and that the portions of the answer relied on do not conflict with the complaint. Moreover, because Mississippi relied on the Appendix in its motion for leave to file a complaint, it should be considered part of the pleadings.

Mississippi has replied to Tennessee's, the Memphis Defendants', and the United States' responses in opposition to its motion to exclude. Mississippi claims that its motion for leave to file a complaint is not a pleading, that the Appendix and other documents referenced in the

motion for leave are not integral to Mississippi's claims, and that the Defendants and the United States are arguing in favor of an overbroad use of judicial notice.

IV. LEGAL STANDARD

Under Supreme Court Rule 17(2), which governs original actions, “[t]he form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed,” but, “[i]n other respects, those Rules . . . may be taken as guides,” not strict requirements. Rule 12(c) of the Federal Rules of Civil Procedure provides that “a party may move for judgment on the pleadings.” Under Rule 12(h)(2)(B), a litigant may move for dismissal on the basis of a failure to state a claim upon which relief can be granted “by a motion under Rule 12(c).” When this occurs, courts generally “apply the same standards for granting the appropriate relief or denying the motion as [they] would have employed had the motion been brought prior to the defendant’s answer under [Rule 12(b)(6)].” 5C Charles Alan Wright, et al., *Federal Practice & Procedure* § 1367 & n.22 (3d ed. 2004 & Supp. 2016) (collecting cases).

In considering a motion to dismiss for failure to state a claim, courts look to see whether the complaint “contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Wood v. Moss*, 134 S. Ct. 2056, 2067 (2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). While well-pleaded facts are accepted as true, legal conclusions need not be. *See Iqbal*, 556 U.S. at 679. And, though “a complaint need not pin plaintiff’s claim for relief to a precise legal theory,” some “cognizable” theory of recovery must exist. *Skinner v. Switzer*, 562 U.S. 521, 530–31 (2011); *see also Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939) (noting that, in the context of an original action, the complaint must “assert[] a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence”).

V. DISCUSSION

A. *Equitable Apportionment and Interstate Waters in General*

“Federal common law governs interstate bodies of water, ensuring that the water is equitably apportioned between the States” *Virginia v. Maryland*, 540 U.S. 56, 74 n.9 (2003) (citing *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982)). The Supreme Court has identified two avenues by which States may resolve disputes over interstate bodies of water: they may negotiate compacts—which require congressional approval under Article I, Section 10 of the Constitution—that define their respective rights to water in an interstate resource, or they may petition the Court for an equitable apportionment of the water. *See Kansas v. Nebraska*, 135 S. Ct. 1042, 1052–53 (2015). Where a compact exists, the Court’s role is to declare rights under it and enforce its terms. *Id.* at 1052 (citing *Texas v. New Mexico*, 462 U.S. 554, 567 (1983)). But, in the absence of a compact, “[e]quitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream.” *Colorado v. New Mexico*, 459 U.S. at 183 (citing *Connecticut v. Massachusetts*, 282 U.S. 660, 670–671 (1931); *Kansas v. Colorado*, 206 U.S. 46, 98 (1907)). The parties allege neither that an interstate compact governs the Aquifer nor that the Aquifer has ever been previously apportioned.

Mississippi contends that equitable apportionment does not apply to its claims, and it has explicitly stated that it does not seek an equitable apportionment of the Aquifer. (Compl. ¶¶ 38, 48.) On the other hand, Tennessee, the Memphis Defendants, and the United States aver that this case falls within the equitable-apportionment doctrine and that the case should be dismissed because the Aquifer has not yet been apportioned and Mississippi does not seek apportionment.

B. Equitable Apportionment and Groundwater

At the outset, there is an open question as to whether the equitable-apportionment doctrine applies to interstate groundwater resources. Mississippi suggests that the doctrine governs groundwater disputes only when groundwater is “hydrologically connected to . . . disputed surface water.” (Miss. Resp. 1 n.2; *see also* Compl. ¶ 41.) Although the Supreme Court has indicated that equitable-apportionment principles govern disputes between States over a body of interstate surface water with a groundwater component, *see, e.g., Texas v. New Mexico*, 462 U.S. at 556–58, 557 n.2, no decision appears to have applied the doctrine to a dispute primarily concerning groundwater. Nonetheless, the mere fact that the subject water is contained underground rather than on the surface does not appear to have a meaningful impact on whether an equitable apportionment is required. Equitable apportionment has been applied to a variety of interstate water disputes—and even to runs of anadromous fish. *See Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1024–25 (1983). Further, the Court has indicated that equitable apportionment applies when “the action of one State reaches through the agency of natural laws into the territory of another State.” *Id.* at 1024 & n.8 (quoting *Kansas v. Colorado*, 206 U.S. at 97–98). In relevant respect, then, groundwater pumping generally resembles surface water pumping; both could have an effect on water in another state through the operation of natural laws.

C. Mississippi’s Competing Territorial Theory

Mississippi claims that, instead of the equitable apportionment doctrine, this dispute is governed by Article IV, Section 3, Clause 1 of the United States Constitution and by the Tenth Amendment. Article IV, Section 3, Clause 1 provides:

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State

be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

And the Tenth Amendment states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Mississippi invokes the doctrine of “equal footing,” which generally provides that “a new State, upon entry, necessarily becomes vested with all the legal characteristics and capabilities of the first 13.” *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1871 n.4 (2016) (citing *Coyle v. Smith*, 221 U.S. 559, 566 (1911)). This principle “is essential to ensure that the nation remains ‘a union of States[alike] in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States.’” *Id.* (alteration in original) (quoting *Coyle v. Smith*, 221 U.S. at 567). Mississippi argues that, under the equal-footing doctrine, it has the sole authority to govern “the appropriation of all water located within its territorial borders.” (Miss. Resp. 11.)

Mississippi’s discussion of equal footing does not appear to show that the doctrine applies to disputes concerning a State’s pumping from an interstate resource. Mississippi cites *Kansas v. Colorado*, 206 U.S. at 93, for the proposition that it has “full jurisdiction over the lands within its borders, including the beds of streams and other waters” such that it can “determine and enforce its own water law and policy for water located within its borders.” (Miss. Resp. 11.) But, contrary to Mississippi’s assertion, this portion of *Kansas v. Colorado* speaks only of land—including the beds of streams and other waters—contained within a state’s territorial boundaries, not neighboring states’ rights to draw from bodies of interstate water. *See* 206 U.S. at 93. Likewise, none of the cases Mississippi cites for the proposition that “the territorial boundary is the beginning and end of each State’s sovereign rights” encompasses the pumping of interstate water. (Miss. Resp. 12.) *Rhode Island v. Massachusetts* concerned a

dispute over the proper location of the boundary between two States. 37 U.S. 657, 726, 733–34 (1838). *United States v. Louisiana* addressed a dispute between the federal government and several States over ownership of “the lands, minerals, and other natural resources underlying the waters of the Gulf of Mexico.” 363 U.S. 1, 5 (1960). And, in *Louisiana ex rel. Guste v. United States*, a federal district court found that the United States had, pursuant to statute, previously compensated Louisiana for any potential claim that it had for the “depletion of an allegedly common hydrocarbon pool, underlying both state and federal submerged lands.” 656 F. Supp. 1310, 1312 (W.D. La. 1986), *aff’d*, 832 F.2d 935 (5th Cir. 1987). The decision did not discuss the equal-footing doctrine. Moreover, although conceptually distinct, that case more closely resembled an equitable-apportionment dispute resolved pursuant to an interstate water compact than a claim similar to the one Mississippi proposes. *See id.* at 1319 (noting that Louisiana complained that it was “deprived . . . of a reasonable opportunity to recover an *equitable share* of the potentially common pool” (emphasis added)).

Tarrant Regional Water District v. Hermann does not fully support Mississippi’s theory either. 133 S. Ct. 2120 (2013). Surely, as Mississippi points out, the Court noted in *Tarrant* that states have a sovereign right to exercise “control over waters within their own territories.” *Id.* at 2132. But the context of the case is of paramount importance here. *Tarrant* concerned a party that, pursuant to an interstate compact, asserted a “right to *cross state lines* and divert water from” a state that it was not a citizen of. *Id.* at 2129 (emphasis added). Specifically, a Texas state agency sought a permit from Oklahoma “to take 310,000 acre feet per year of surface water from the Kiamichi River, a tributary of the Red River located in Oklahoma.” *Id.* at 2128 (footnote omitted). The agency knew that Oklahoma law “effectively prevent[ed] out-of-state applicants from taking or diverting water from within Oklahoma’s borders,” but it sought to enjoin the

enforcement of those restrictions as, among other things, contrary to the Red River Compact. *Id.* at 2128–30. The Court held that Oklahoma had a sovereign “power to control . . . public uses of water” within its borders and that the Red River Compact “does not create any cross-border rights in signatory States”—that is, rights for individuals and entities outside Oklahoma to enter its borders and remove water. *Id.* at 2132, 2136 (citing *United States v. Alaska*, 521 U.S. 1, 5 (1997)).

Mississippi does not allege that any of MLGW’s wells are located within its borders. (*See* Compl. ¶ 19.) As discussed above, *Tarrant* implied that, unless a State has specifically agreed to the contrary, it may generally regulate water-collection activities occurring within its own borders. But the Court nowhere suggested that, in the absence of an equitable apportionment, a State may sue for the effects that occur within its borders as a result of out-of-state collection of water from an interstate resource.¹

That no previous case has recognized an equal-footing claim in the context of a dispute over the depletion of interstate water does not, in itself, mean that such a claim is necessarily invalid. But, as the United States and the defendants point out, applying Mississippi’s theory of sovereign rights to an interstate water dispute would be inconsistent with the Court’s existing equitable-apportionment doctrine. In equitably apportioning water, the Court considers a range of factors and has recognized that “the equitable apportionment of appropriated rights should turn on the benefits, harms, and efficiencies of competing uses” *Colorado v. New Mexico*, 467 U.S. 310, 323 (1984). In some instances, the Court has found that certain geographical considerations—such as the state in which an interstate water source originates—are “essentially irrelevant” to equitable apportionment. *Id.* Likewise, the Court has flatly rejected “a *per se* rule

¹ Indeed, the Court noted that limits apply to a State’s control of water within its own borders and explicitly restricted its holding to the issue of “whether the parties’ silence on state boundaries in the allocation of water under a compact suggests that borders are irrelevant for that allocation.” *Tarrant*, 133 S. Ct. at 2133 n.11.

of apportionment” that the fact that an interstate river originates in a State “automatically entitles [that State] to a share of the water” *Colorado v. New Mexico*, 459 U.S. at 181 n.8; *see also Colorado v. New Mexico*, 467 U.S. at 323. Stated simply, “a State may not preserve solely for its own inhabitants natural resources located within its borders.” *Idaho ex rel. Evans v. Oregon*, 462 U.S. at 1025 (citing *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982); *Hughes v. Oklahoma*, 441 U.S. 322, 330 (1979); *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978)). Thus, a strict geographic-sovereignty analysis of an interstate water source appears to be at odds with the equitable-apportionment doctrine.

For these reasons, Mississippi’s equal-footing theory does not appear to apply to disputes over depletion of interstate water.²

D. Mississippi’s Alternative Theories

As an alternative to equal footing, Mississippi asserts claims based on various state-law theories: trespass, conversion, “intentional tortious conduct,” and restitution. (Miss. Resp. 23–25.) To the extent Mississippi relies on state law as such, federal common law displaces these claims if the Aquifer is, in fact, an interstate body of water. *See Virginia v. Maryland*, 540 U.S. at 74 n.9. And to the extent Mississippi relies on state law to demonstrate the content of federal common law (Miss. Resp. 23 & n.15), its arguments are unpersuasive. As discussed in detail above, the Supreme Court has indicated that equitable apportionment is the federal common-law principle that applies to disputes over interstate water. *See Colorado v. New Mexico*, 459 U.S. at 183. As with the equal-footing claim, then, the threshold question is whether the water at issue is interstate in nature.

² Of note, Mississippi argues that “the Court possesses all the authority necessary to grant any relief it determines appropriate in the exercise of its original and exclusive jurisdiction.” (Miss. Resp. 14.) While this may be true, it does not speak to the issue of whether Mississippi has stated a cognizable claim.

E. Interstate Water

Given that equitable apportionment appears to apply to disputes between States over interstate groundwater, and Mississippi's equal footing theory does not appear to apply to the depletion of interstate bodies of water, the question then becomes whether Mississippi's claims touch on such an interstate resource. As a preliminary matter, Mississippi's nominal identification of the water at issue as intrastate water—and, conversely, as not having interstate characteristics—is a legal conclusion. “While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.” *Iqbal*, 556 U.S. at 679. Therefore, Mississippi's mere identification of the water at issue as intrastate is “not entitled to [an] assumption of truth.” *Id.* at 680.

1. Issue Preclusion

Tennessee and the Memphis Defendants contend that the Fifth Circuit has already determined that the Aquifer is interstate in nature and that equitable apportionment is therefore necessary. As a result, the defendants claim, issue preclusion bars Mississippi from relitigating these matters in the present case.

The Court has indicated that it “regularly turns to the Restatement (Second) of Judgments for a statement of the ordinary elements of issue preclusion.” *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015) (citations omitted). Subject to certain exceptions, “[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.” *Id.* (alteration in original) (quoting Restatement (Second) of Judgments § 27, p. 250 (1980)). The doctrine serves to “protect against ‘the expense and vexation attending multiple lawsuits, conserv[e]

judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions.’” *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (alterations in original) (quoting *Montana v. United States*, 440 U.S. 147, 153–154 (1979)). The Court has advised that “[a]lthough the idea of issue preclusion is straightforward, it can be challenging to implement.” *B & B Hardware*, 135 S. Ct. at 1303.

On the face of the matter, the Fifth Circuit indeed appears to have determined that the Aquifer is an interstate resource and that an equitable apportionment is necessary to grant relief, and the parties appear to have actually litigated these issues. *See Hood*, 570 F.3d at 629–30 (“We find that the district court made no error of law as to the necessity of equitably apportioning the Aquifer. The Aquifer is an interstate water source, and the amount of water to which each state is entitled from a disputed interstate water source must be allocated before one state may sue an entity for invading its share.”). Moreover, the Fifth Circuit’s conclusion that Tennessee was a necessary but unavailable party under Rule 19 depended on the finding that interstate water was at issue and that an equitable apportionment was required; therefore, these determinations were essential to the judgment. *See Bobby v. Bies*, 556 U.S. 825, 834 (2009) (noting that, “[i]f a judgment does not depend on a given determination,” the matter is not essential).

But this is not the end of the inquiry; an exception to the general rule may still apply. Here, Mississippi contends that issue preclusion should not apply because “giving preclusive effect to the finding[s] of the district court and court of appeals would impermissibly delegate the Supreme Court’s exclusive authority over original actions.” (Miss. Resp. 36.) The United States did not argue in favor of issue preclusion either. Instead, it noted that there is “some force” to Mississippi’s argument “because the very subject of an equitable apportionment *between two States* is one committed to that exclusive jurisdiction.” (U.S. Br. 23 n.4.)

In actions within its exclusive jurisdiction, the Court does not appear to have definitively determined whether issues decided by other courts are given preclusive effect. It has indicated that issue preclusion may attach in an action within its exclusive jurisdiction where a matter was litigated before it in a prior exclusive-jurisdiction case. *See New Hampshire v. Maine*, 532 U.S. 742, 748–49 (2001). In addition, the Court has seemingly assumed that, in an original action, issue preclusion may bar the relitigation of matters previously decided by the Court of Claims—though it ultimately held that the issues were not “actually litigated” because the previous action was disposed of pursuant to a consent decree. *See Arizona v. California*, 530 U.S. 392, 413–18 (2000). And, though the issue did not concern the Court’s own exclusive jurisdiction, it has noted that “a state court judgment may in some circumstances have preclusive effect in a subsequent action within the exclusive jurisdiction of the federal courts.” *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). None of these decisions provides a definitive answer to the question of whether issue preclusion should apply here.

Section 28(3) of the Restatement (Second) of Judgments provides that, even if a court’s previous determination of a matter meets the general requirements, issue preclusion will not apply if “[a] new determination of the issue is warranted . . . by factors relating to the allocation of jurisdiction between [the two courts].”³ The comments to § 28 clarify that preclusion is inappropriate when

the legislative allocation of jurisdiction among the courts . . . ha[s] been designed to insure that when an action is brought to determine a particular issue directly, it may only be maintained in a court having special competence to deal with it. In such instances, after a court has incidently determined an issue that it lacks jurisdiction to determine directly, the determination should not be binding when a second action is brought in a court having such jurisdiction. The question in each

³ The Court has generally treated § 28 as persuasive. *See, e.g., B & B Hardware*, 135 S. Ct. at 1303; *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 850 (2014); *Bobby*, 556 U.S. at 834. The Court has viewed the commentary to § 28 as persuasive as well. *See, e.g., B & B Hardware*, 135 S. Ct. at 1305; *Bobby*, 556 U.S. at 837.

case should be resolved in the light of the nature of litigation in the courts involved and the legislative purposes in allocating jurisdiction among the courts

Restatement (Second) of Judgments § 28, cmt. *d*.⁴

Under Article III, Section 2, Clause 2, of the Constitution, the Supreme Court has original jurisdiction “[i]n all Cases . . . in which a State shall be a Party” Congress has further provided that “[t]he Supreme Court shall have original *and exclusive jurisdiction* of all controversies between two or more States.” 28 U.S.C. § 1251(a) (emphasis added). The Court has emphasized that § 1251(a) commits it to “exercise [its] independent judgment as to both fact and law in executing [its] role as the ‘exclusive’ arbiter of controversies between the States.” *Alabama v. North Carolina*, 560 U.S. 330, 344 (2010). Moreover, as the United States points out, the matters the defendants seek to preclude touch on “the very subject” of a matter committed to the Court’s exclusive jurisdiction—the cause of action available to a State complaining of another State’s conduct. (U.S. Br. 23 n.4.) Thus, the nature of the litigation and Congress’s allocation of jurisdiction both cut against applying issue preclusion here.

The issue is certainly close, but, in the absence of a clear indication from the Court that issue preclusion attaches to determinations made by other courts on matters central to its exclusive jurisdiction, the undersigned declines to recommend that the Court dismiss the matter on these grounds.

2. Contents of the Complaint

Turning to the factual basis for Mississippi’s claim that the water at issue is not interstate water, the complaint avers that the groundwater at issue “originated in Mississippi and was naturally stored and resided in Mississippi.” (Compl. ¶ 14.) Moreover, the complaint indicates

⁴ Though Comment *d* to § 28 discusses “[c]ourts of the same state” rather than federal courts, Comment *e*, which discusses federal courts, recognizes that the relevant discussion in Comment *d* has broader applicability. Restatement (Second) of Judgments § 28, cmts. *d*, *e*.

that “[u]nder natural conditions, [the water] would not leave Mississippi’s groundwater storage.” (*Id.*) According to the complaint, the water was “[o]riginally . . . stored as groundwater within the territorial borders of Mississippi” and “resid[ed] under significant hydrostatic pressure within Mississippi’s borders.” (*Id.* at ¶¶ 16, 17.) It further identifies the water at issue as “a finite, confined intrastate natural resource” that “would never be available within Tennessee’s territorial borders” under natural conditions. (*Id.* at ¶ 17.) In addition, “[u]nder natural conditions, this groundwater volume and pressure would have remained within Mississippi as an available natural resource for Mississippi and its people.” (*Id.*) According to Mississippi, the groundwater pumped by MLGW “ha[s] been permanently taken from Mississippi and its people, even if MLGW’s pumping immediately ceased altogether.” (*Id.* at ¶ 26.)

First, neither Mississippi’s claims that certain “groundwater volume and pressure would have remained within Mississippi” absent Tennessee’s pumping nor its assertion that certain water has been “permanently taken from Mississippi and its people” are helpful to its position. (Compl. at ¶ 17.) The fact that a State’s actions deplete the quantity of water available in another State is the basis of many—if not all—interstate water disputes. Thus, the fact that Mississippi has less groundwater available to it than it would have in the absence of MLGW’s pumping does not tend to show that the relevant water lacks an interstate character.

Mississippi maintains that, though “some groundwater collected and stored at a short stretch of the States’ common border would eventually naturally seep into Tennessee,” some other portion of the water would have never travelled into Tennessee but for the groundwater pumping in Memphis. (Miss. Resp. 17 n.12, 30 n.22.) Because it has limited its claims to this latter portion of the Aquifer, Mississippi contends, the water it is suing over is not interstate water subject to equitable apportionment. (*Id.* at 17–18.)

There is some logical appeal to this argument. If certain water would never travel outside a single state, then in some sense that water could be said to lack an interstate character. Mississippi makes this point by citing to opinions that considered the Commerce Clause implications of a state fee assessed “on trucks that undertake point-to-point hauls between Michigan cities,” *Am. Trucking Assocs., Inc. v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 431, 434 (2005), a gravel supplier’s claim that a company had “interfered with interstate commerce by conspiring to control the construction industry in the Commonwealth of Puerto Rico,” *David Cabrera, Inc. v. Union de Choferes y Duenos de Camiones Hermanados de Puerto Rico*, 256 F. Supp. 839, 841 (D.P.R. 1966), “whether the sale of local telephone network access services used in connection with interstate telephone calls is subject to state sales tax” in Colorado, *AT & T Commc’ns of Mountain States, Inc. v. Colo. Dep’t of Revenue*, 778 P.2d 677, 678 (Colo. 1989), and whether the activities of certain cruise ship operations were “‘intrastate’ in nature” as defined by Florida’s sales and use tax, *Fla. Dep’t of Revenue v. New Sea Escape Cruises, Ltd.*, 894 So. 2d 954, 961 (Fla. 2005). But because their factual circumstances do not touch on water or other similar resources, these cases provide little insight into whether certain water should be considered “interstate” for purposes of equitable apportionment.

Rather, the understanding of interstate water suggested by the defendants and the United States appears to be more persuasive. A case at the roots of the equitable apportionment doctrine, *Kansas v. Colorado*, found that when

the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.

206 U.S. at 97–98; *see also Idaho ex rel. Evans v. Oregon*, 462 U.S. at 1024 (identifying *Kansas v. Colorado* as a foundational equitable apportionment case). Moreover, the Court has noted that the doctrine of equitable apportionment is based on “the same principle that animates many of [its] Commerce Clause cases: a State may not preserve solely for its own inhabitants natural resources located within its borders.” *Idaho ex rel. Evans v. Oregon*, 462 U.S. at 1025 (citing *New England Power Co.*, 455 U.S. at 338; *Hughes*, 441 U.S. at 330; *Philadelphia v. New Jersey*, 437 U.S. at 627).⁵ These cases evince a functional approach to determining when water is subject to equitable apportionment: If a body of water is such that the removal of water within a State’s borders can have a direct effect on the availability of water in another State, the resource is likely interstate in nature.

Mississippi also attempts to distinguish between the geology of the Aquifer—the “larger Sparta Sand formation [that] crosses State borders”—and the groundwater it claims is part of the Aquifer but would never have entered Tennessee absent pumping. (Miss. Resp. 16 n.11.) This distinction does not appear to be material for purposes of determining whether the water at issue is interstate water. In a foundational equitable apportionment case, the Court indicated that the geological characteristics of a water resource are relevant to whether it should be considered interstate in nature, even going so far as to reject a claim that a river that periodically ran dry between two points in different States was “two rivers, one commencing in the mountains of Colorado and terminating at or near the state line, and the other commencing at or near the place where the former ends” *Kansas v. Colorado*, 206 U.S. at 115. In concluding that this resource should be considered a single river flowing through multiple states, the Court found persuasive the fact that only one river “ha[d] been recognized by geographers, explorers, and

⁵ Because the Court has explicitly drawn this parallel between the Commerce Clause and its equitable apportionment jurisprudence, *see Idaho ex rel. Evans v. Oregon*, 462 U.S. at 1025, Mississippi’s suggestion that this principle is inapplicable lacks merit. (See Miss. Resp. 28.)

travelers.” *Id.* Simply put, no Supreme Court decision appears to have endorsed one State suing another State, without equitable apportionment, for the depletion of water that is part of a larger interstate resource by limiting its claims to a specific portion of the water.

Mississippi has not claimed that any of MLGW’s pumps are located in Mississippi, yet it maintains that pumping in and around Memphis reduces the water available within Mississippi’s borders. (Compl. ¶¶ 19, 22–24.) For example, Mississippi admits that “the Sparta Sand formation . . . extends into western Tennessee” and that “the Memphis Sand Aquifer was supplied in large part by the Sparta Sand.” (*Id.* at ¶¶ 18, 22.) The complaint also concedes that “natural seepage” occurs by which water in the Aquifer moves between Mississippi and Tennessee. (*Id.* at ¶ 24.) Therefore, the complaint appears to have failed to plausibly allege that the water at issue is not interstate in nature.

3. Matters Outside the Complaint and the Motion to Exclude

In addition to the matters within the complaint, Tennessee, the Memphis Defendants, and the United States point to several matters outside the complaint: (1) materials Mississippi filed in its Appendix to its motion for leave to file a bill of complaint; (2) the record from the prior Fifth Circuit litigation; (3) statements from the January 26, 2016, hearing before the Special Master; (4) briefs filed in support of or in opposition to Mississippi’s motion for leave to file a bill of complaint; (5) factual allegations in the defendants’ answers; and (6) third-party groundwater studies and population estimates. In its motion to exclude, Mississippi contends that these matters should be excluded from consideration under Rule 12(d) and that “all statements and arguments made by [the defendants and the United States] in reliance thereon” should be excluded as well. (Miss. Mot. to Exclude 3–5.)

Rule 12(d) provides:

If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

The Court has clarified that, in addition to the pleadings, there are “other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (citing 5B Charles Alan Wright, et al., *Federal Practice & Procedure* § 1357 (3d ed. 2004 & Supp. 2007)). In addition, it is commonly recognized that “matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned . . . may be considered . . . without converting the motion into one for summary judgment.” 5B Charles Alan Wright, et al., *Federal Practice & Procedure* § 1357 & n.1 (3d ed. 2004 & Supp. 2016) (collecting cases). “These matters are deemed to be a part of every complaint by implication.” *Id.* § 1357.

To support aspects of their motions, Tennessee and the Memphis Defendants point to portions of the Appendix Mississippi filed with its motion for leave to file a bill of complaint. (See Memphis Mot. 5–6, 18; Tenn. Mot. 4–6, 33–34.) The United States did likewise in its brief. (See U.S. Br. 3–5, 18.) In many instances, these citations served only as background material and do not touch on the merits of the motions for judgment on the pleadings. Other times, the materials are essentially duplicative of information contained in the complaint itself. However, the defendants cite to certain portions of the Appendix that tend to show that water in the Aquifer naturally flowed from Mississippi into Tennessee before pumping began. (See Mot. for Leave to File a Bill of Compl. 20a, 70a.) These materials certainly do not help Mississippi’s argument, and, perhaps, they form part of the complaint for purposes of the pending motions as the

defendants and the United States maintain. But they are not essential to this memorandum's reasoning.

As for the matters in the record of the Fifth Circuit proceedings, the defendants and the United States cite to the appellate decision and Mississippi's briefs in the prior litigation. (*See* Memphis Mot. 19–20; Tenn. Mot. 6, 23, 37–40; U.S. Br. 5–7.) The defendants and the United States argue that they relied on these materials “not for the truth of the facts recited therein,” but for their existence. *Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 576 (6th Cir. 2008). At times, however, these materials have been pointed to for the purpose of arguing that Mississippi previously alleged that the Aquifer is an interstate resource and that it may not now take a contrary position. (*See, e.g.*, Memphis Mot. 19–20.) Additionally, the defendants appear to have relied on the Fifth Circuit's opinion to demonstrate that the alleged facts show that the Aquifer is an interstate resource subject to equitable apportionment. (*See, e.g.*, Tenn. Mot. 23.) This memorandum does not rely on the Fifth Circuit record for either of these purposes. Rather, it looks to the Fifth Circuit record only to the extent necessary to provide a discussion of the procedural history of this matter and to reject the defendants' issue-preclusion argument.

The memorandum has not relied on the remainder of the materials Mississippi seeks to exclude. Tennessee and the Memphis Defendants have pointed to statements made by Mississippi's counsel in the January 26, 2016, hearing, but this memorandum has not considered them. Tennessee and the United States have cited matters within Mississippi's motion for leave to file a bill of complaint. Though these materials are properly reviewed as part of the record of the case, this memorandum's reasoning does not rely on them. Likewise, the undersigned has not relied on or considered the third-party groundwater studies and population estimates Mississippi seeks to exclude. The answer itself is part of the pleadings and can be considered—although any

well-pleaded factual allegations in the complaint must be accepted as true. *See L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011). But, as the United States correctly points out, the relevant matters in the defendants’ answers are duplicative of allegations in the complaint. Therefore, the answers provide nothing additional to this memorandum’s analysis.

VI. CONCLUSION

Like all cases within the Court’s original jurisdiction, “[a] dispute between States over rights to water” is a serious matter—so serious, in fact, that it might “grounds for war if the States were truly sovereign.” *South Carolina v. North Carolina*, 558 U.S. 256, 289 (2010) (citing *Texas v. New Mexico*, 462 U.S. at 571 n.18). This case is no exception.

Nonetheless, in the absence of an interstate compact, the Court has authorized only one avenue for States to pursue a claim that another State has depleted the availability of interstate waters within its borders: equitable apportionment. Even without referring to the materials Mississippi seeks to exclude, it does not appear that the complaint plausibly alleges that the Aquifer—or the water within the Aquifer that Mississippi sues over—lacks an interstate character. Because Mississippi has explicitly disclaimed a request for equitable apportionment, dismissal would likely be appropriate under Rule 12(c), with leave to file a complaint based upon an equitable-apportionment theory. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

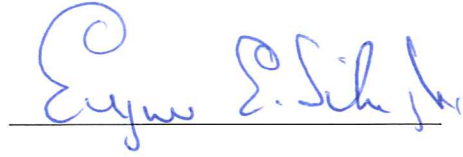
Nonetheless, the Federal Rules of Civil Procedure are not strict mandates in cases within the Court’s original jurisdiction, but rather permissive guides. *See* Supreme Court Rule 17.2. Further, Special Masters have only the authority to provide recommendations for findings of fact and law that the Court must then adopt or reject. Accordingly, they have been advised to err on the side of over-inclusiveness in the record for the purpose of assisting the Court in making its

ultimate determination. On the other hand, they have also been charged with moving the case along in a timely and efficient manner.

Mississippi has recommended the use of phased litigation to “create substantial efficiencies for the Court and the parties.” (Miss. Resp. 35.) In line with this suggestion—and for the reasons stated above—the threshold issue in this matter is whether the Aquifer is an interstate resource. Given the undersigned’s responsibility to prepare an adequate record for review and the seriousness of original jurisdiction cases, especially those involving water disputes between States, an evidentiary hearing on the limited issue of whether the Aquifer and the water constitutes an interstate resource is appropriate. Evidence that would likely be relevant to this determination includes the nature and extent of hydrological and geological connections between the groundwater in Memphis and that in Mississippi, the extent of historical flows in the Aquifer between Mississippi and Tennessee, and similar considerations.

Before the hearing, they should submit a joint prehearing order that details their intended case presentation; lists their stipulated and contested facts and the credentials of the expert witnesses, if any; and lays out a plan for the hearing on this limited issue. Before the hearing, the parties should present any evidentiary motion to the Special Master, which will be ruled on. But the Federal Rules of Evidence provide only guidance in these proceedings; therefore, the undersigned has been instructed to err on the side of over-inclusiveness. Exhibits should be duplicated and distributed to the other parties in advance of the hearing and copies distributed in the courtroom. After the hearing, the parties should submit memoranda of law and proposed findings of fact on the limited issue of whether the Aquifer is an interstate resource.

Dated: August 12, 2016



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